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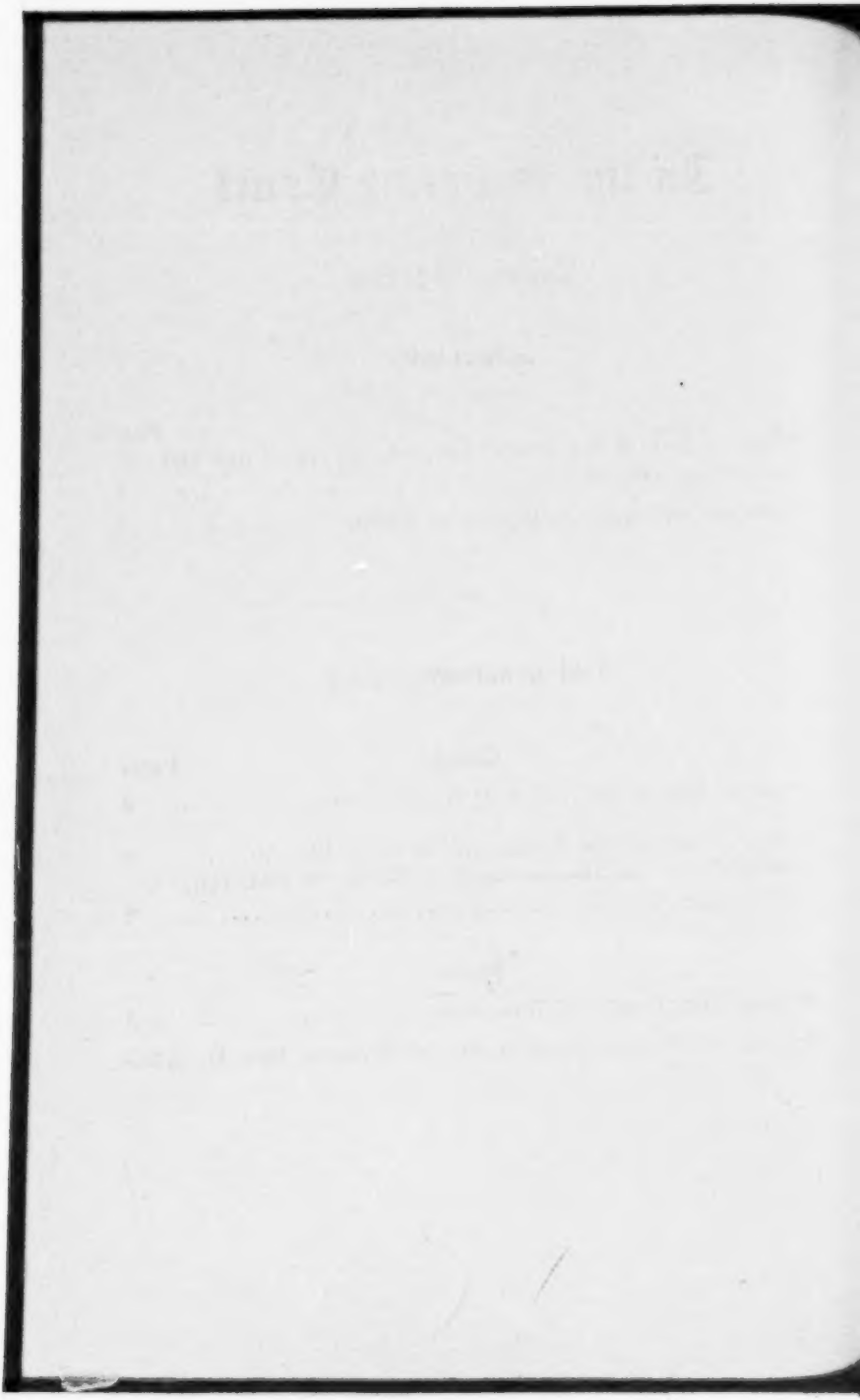

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1948

No. 690

VERN SMITH,
Appellant,
vs.
THE PEOPLE OF THE STATE OF CALIFORNIA,
Appellee.

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING OUT OF TIME AND SUPPORTING AFFIDAVIT.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Appellant hereby moves this Honorable Court for leave to file his petition for rehearing out of time.

The appeal was dismissed for want of a "substantial Federal question". Petitioner filed a petition for

rehearing, mailing the same to reach the Clerk's office on or before May 20, 1949. This was within the former 25 day period under Rule 33, but not within the shortened period of 15 days under the rule as amended.

This motion is made upon the ground that the filing of the petition for rehearing after more than 15 but less than 25 days resulted from the excusable inadvertence of counsel in overlooking the change of time and that it is in the interest of justice to permit the petition for rehearing to be filed and to be heard on its merits and that no prejudice has resulted or can result from the delay.

The motion is based upon the affidavit of George Olshausen and upon supporting points and authorities, both attached hereto, and upon all the papers and files in the case.

Dated, San Francisco, California,
June 7, 1949.

GEORGE OLSHAUSEN,
Attorney for Appellant.

CARL E. BROWN,
Of Counsel.

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State of California,
City and County of San Francisco.—ss.

George Olshausen, being first duly sworn, deposes and says:

That I am and at all times herein mentioned, was attorney for the appellant in the above entitled case; that I was familiar with Rule 33 of the Supreme Court as it stood before January 1, 1948, providing for a 25 days period for filing a petition for rehearing. I prepared the petition with the filing date in mind, 25 days later than the order dismissing the appeal, and had the petition filed within such time. This is the first case which I have handled in the United States Supreme Court since the change of the rule and I had overlooked the amendment which shortened the time for rehearing to 15 days. It was for this reason that the petition for rehearing was offered for filing more than 15 days from the Court's order.

No prejudice will result from the delay of a few days, particularly since the defendant made a deposit as security for his fine while the case was still in the State Court and which money is still on deposit.

GEORGE OLSHAUSEN.

Subscribed and sworn to before me this 7th day of June, 1949.

(Seal) Jane M. Dougherty,
Notary Public in and for the City and County of San Francisco, State of California.

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No. 690

VERN SMITH,
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THE PEOPLE OF THE STATE OF CALIFORNIA,
Appellee.

POINTS AND AUTHORITIES IN SUPPORT OF MOTION.

Rule 33 provides that time for filing a petition for rehearing may be enlarged by order of a Justice or of the Court. It does not require that such order must be before the expiration of the time provided. Good cause for such extension must comprise at least those matters which constitute good cause under Rule of Civil Procedure 60(b).

Authorities arising under similar statutes hold that confusion as to time for filing is excusable neglect and good ground for setting aside a default.

Security Trust and Savings Bank v. Walsh, 91 Fed. (2d) 481, 484 (C.C.A. 9);

Savage v. Cannon, 204 S. Car. 473, 30 S.E. (2d) 70, 71;

People v. Bryant, 207 Cal. 450, 451-2, 278 Pac. 1025 (confusion due to recent change of statute).

Dated, San Francisco, California,
June 7, 1949.

Respectfully submitted,
GEORGE OLSHAUSEN,
Attorney for Appellant.

CARL E. BROWN,
Of Counsel.

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